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June 29, 1995

VIA FEDERAL EXPRESS

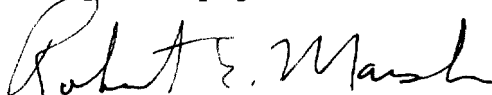
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Comments to Notice of Inquiry
CS Docket No. 95-61

Gentlemen:

Enclosed are an original and four copies of Comments of National Cable Television Cooperative, Inc. to the Notice of Inquiry in connection with the Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, CS Docket No. 95-61.

Very truly yours,


Robert E. Marsh

REM:mw
Enclosures

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BEFORE THE FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

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In the matter of: Annual
Assessment of the Status of
Competition in the Market for
Delivery of Video Programming.

CS Docket 95-61

COMMENTS OF NATIONAL CABLE TELEVISION COOPERATIVE, INC.

By Notice of Inquiry adopted May 4, 1995 and released May 24, 1995 the Federal Communications Commission has requested comments on a variety of matters relating to competition in the market for delivery of video programming. Paragraph 90 of the Notice of Inquiry focused on program access rules and their impact on discriminatory practices in the distribution of video programming.

National Cable Television Cooperative, Inc. ("NCTC") is a nonprofit corporation organized to serve as a "buying group" for cable television system operators. Most of NCTC's members operate small cable television systems.¹ One of NCTC's primary activities is the negotiation of master agreements with video programming providers. In connection with these activities over the past ten years NCTC has encountered many instances of discriminatory practices. These comments will offer NCTC's view as to the impact of the 1992 Cable Act upon these discriminatory practices and its opinion as to potential improvement upon the provisions of the 1992 Cable Act.

¹NCTC represents over 3500 cable systems having an aggregate of about 3,800,000 subscribers. More than half of the cable systems that purchase programming through NCTC serve fewer than 300 subscribers. More than half of the multiple system operators that are members of NCTC serve fewer than 850 total subscribers.

History of Dealings With Program Providers

Since its formation over 10 years ago, NCTC has attempted to negotiate a master agreement with virtually every major provider of cable television video programming. Although the majority of programming providers have recognized NCTC as a buying group and have negotiated in good faith with NCTC, several providers have flatly refused to recognize or negotiate with NCTC. Examples of significant programming services that are not available through NCTC because of this absolute refusal include ESPN and ESPN 2 (owned by Capital Cities/ABC and The Hearst Group), Country Music Television and The Nashville Network (owned by Group W and Gaylord Entertainment), Lifetime (owned by Capital Cities/ABC and The Hearst Group) and USA (owned by MCA and Viacom).

The history of NCTC's relationship with Group W is representative of the difficulty NCTC has encountered in being recognized as a legitimate buying group by certain providers, particularly programming providers owned by broadcasters and movie studios. NCTC entered into an agreement with the former owners of Country Music Television ("CMT") in 1989 and many of its members were purchasing CMT under that agreement at the time Group W acquired distribution control of CMT. As a result of that acquisition Group W controlled the only two viable country music video programming services. Group W initially sought to avoid any obligation under NCTC's contract with respect to CMT. At NCTC's vigorous insistence, however, Group W did honor the CMT contract although it refused to enter into any master agreement with respect to The Nashville Network. NCTC was recently advised that upon expiration of the CMT contract later in 1995, Group W will not consider renewal of that agreement and will discontinue any contractual relationship with NCTC. This will affect over 150 member companies serving in excess of 1,700 communities with more than 740,000 subscribers.

Impact of Program Access Rules Applied to Vertically Integrated Program Providers

Prior to the 1992 Cable Act several vertically integrated program providers refused to negotiate with NCTC. Since the 1992 Cable Act, and probably as a result of the provisions of that Act, NCTC has entered into master agreements with virtually all vertically integrated program providers.

Interestingly, however, even before the 1992 Cable Act, a larger portion of the program providers who refused to recognize NCTC were not vertically integrated, but were providers owned by broadcasters and movie studios such as those identified above. Nothing in the 1992 Cable Act or the FCC's rules affected the unwillingness of these program providers to deal with NCTC.

Distinctions Between Vertically Integrated and Non-Vertically Integrated Program Providers.

From the standpoint of NCTC and its member cable television systems, there is little distinction between the competitive impact of discrimination by vertically integrated program providers and discrimination by non-vertically integrated program providers. In either case the party disfavored by the discriminatory practice (the smaller system without bargaining power) will be damaged. Since over-building of cable television systems by other cable television operators (particularly major operators with vertically integrated programming interests) has been a rare occurrence, the

risk of discrimination by vertically integrated providers has not been significantly greater than the risk with respect to non-vertically integrated providers. As a practical matter vertically integrated providers are in no better position to inflict competitive harm than are non-vertically integrated providers.

Impact of Discriminatory Practices on the
Competitive Viability of Small Systems and
Small System Operators.

In the competitive environment evolving in the video programming distribution industry, members of NCTC are likely to be those most severely impacted by increasing competition.² The ability of NCTC to negotiate master agreements that are then made available to its members provides significant economic and competitive benefits to those members. Where NCTC is unable to enter into a master agreement with a programming provider that offers lower rates to others, however, competitive harm results.

Direct satellite video distribution (such as DirectTV owned by Hughes/GM) provides an example of the competitive environment likely to be faced by NCTC's members.³ Direct satellite service is

²Many FCC rules recognize the competitive and economic obstacles faced by smaller cable television systems and have modified the applicability of certain rules to those smaller systems.

³Although at the present time the penetration of direct satellite video distribution services is not substantial, that penetration is virtually certain to increase, significantly at the expense of NCTC members.

most likely to gain acceptance in rural areas as a result of limited coverage and, in some cases, technical capability limitations of the smaller systems serving those rural areas. With NCTC's median cable system serving fewer than 300 subscribers, direct satellite-to-home distribution is likely to be a significant competitive threat to NCTC members in the years ahead.

Group W and other non-vertically integrated providers who have refused to recognize NCTC have offered, and will no doubt continue to offer, their service through DirectTV and similar distribution vehicles. Although NCTC does not know the precise wholesale rates charged by these providers to entities such as DirectTV, the retail rates charged by DirectTV are such that it is likely that the wholesale pricing to DirectTV is less than the pricing to NCTC members. These rates are probably not, however, significantly lower than the pricing afforded to large MSOs that are able to negotiate with the programming providers as a representative of significant number of subscribers.

In the near future NCTC members are likely to find themselves in the unfortunate position of competing with alternative distribution systems that are able to purchase similar programming at a lower price.

Absence of Justification for Discriminatory Practices

As described above, it is the current practice of several non-vertically integrated video programming providers to not negotiate with NCTC. These providers are able to charge NCTC's small system operator members a per subscriber rate meaningfully higher than rates charged to larger multiple system operators (MSOs) and, in all likelihood, rates charged to other competing video programming distributors.⁴ Yet there is no meaningful distinction in cost to a video programming provider between dealing with NCTC members through NCTC and dealing with MSO systems through the corresponding MSO. NCTC assumes responsibility for billing all its members and sending one payment, along with a complete report covering all systems, to the provider. NCTC's record of timely and complete payment is remarkable. In the entire history of NCTC no member has ever defaulted on any payment owed to a video programming provider. There are many other benefits available to a programming provider willing to enter into a relationship with NCTC. NCTC sees no legitimate reason that a programming provider would be willing to deal with MSOs (that pay on behalf of many separate cable television systems) and NCTC (that likewise pays on behalf of many separate cable television systems).

⁴It is likely that these alternative distributors serve fewer subscribers than the aggregate number of subscribers represented by NCTC.

Conclusion

The unjustified price discrimination described above is beginning to impact the competitive viability of NCTC members' cable television systems and, in the years ahead, is likely to further impact the viability of these systems most of which are small-town and rural communities. It is NCTC's opinion that laws preventing improper price discrimination are as critical with respect to video programming distribution as they are with respect to other commercial transactions.⁵ The prohibition of discrimination by vertically integrated program providers was an appropriate first step, but did not address the larger problem presented by discriminatory practices of non-vertically integrated program providers. Based on NCTC's experience, there is no reason that different rules should apply to vertically integrated and non-vertically integrated programming providers. Fair competition in the emerging video programming distribution business depends upon a uniform and strict rule prohibiting all unfair price discrimination.

Respectfully submitted,

National Cable Television
Cooperative, Inc.

By: 
Michael L. Pandzik, President

⁵For decades it has been illegal for a supplier to discriminate in price in the sale of comparable goods to similarly situated buyers.